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No. 1612

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

VS.

VEGOD CORPORATION,
WESTERN INSTITUTE OF RETAILING, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

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Unlike the trial court and the court of appeal, the California Supreme Court held that respondent merchandising corporations were not required to prove actual malice. Respondents attempt to defend that decision by arguing the result reached is consonant with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Their argument is misleading: The California Supreme Court did not apply *Gertz* but, on the contrary, rejected it. The Court's holding was that the

Gertz test for determining who is a public figure (and, therefore, who must prove actual malice) has no application to any communications about matters of interest to consumers:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (Petition App., p. A-8)

Not only does *Gertz* promulgate a different test for application of the actual malice standard, it specifically rejects subject matter tests of the kind applied by the California Supreme Court. Such tests, according to this Court, inevitably require courts to determine "what information is relevant to self-government". 418 U.S. at 346. *Accord, Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976). The danger inherent in requiring courts to make this determination is apparent here where the California Supreme Court found unworthy of protection a type of information other courts consider of high societal value. For example, in *Steaks Unlimited, Inc. v. Deaner,* 6 Med. L. Rptr. 1129 (U.S.C.A. 3d Cir. 1980), the United States Court of Appeals specifically recognized the importance of the actual malice standard in protecting precisely the same type of information.

The primary issue before this Court, therefore, is whether the California Supreme Court committed federal constitutional error in refusing to follow *Gertz* and in applying a proscribed subject matter test that excludes from the protection of the actual malice standard all information about the value and safety of goods and services.

With respect to the second issue raised in the petition for certiorari, respondent corporations assert that "there is

no logical reason" to distinguish between corporations and natural persons in determining application of the actual malice standard. (Resp. Brief, p. 10) Federal district courts have found the question more difficult. One federal court has made the distinction (*Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 155-56 (D.D.C. 1976)) and two have not. *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977). Thus a conflict exists over whether the distinction should be made and only this Court can resolve it.

With respect to the third issue raised in the petition, respondents state that "petitioners cite no case law which in any way demonstrates that the California constitution does compel a finding that respondents in these circumstances must prove actual malice within the meaning of *New York Times v. Sullivan, supra.*" (Resp. Brief, p. 11) Respondents' statement misses the point. Petitioners do not contend that the issue was wrongly decided but that they were denied due process when the California Supreme Court refused to decide. That the underlying California constitutional law issue is not frivolous is established by the fact that the dissenting judges of the California Supreme Court reached the issue and determined that the state constitution does require respondents to prove actual malice.

Respondents' brief sidesteps the issues in the pending petition for certiorari. Contrary to the impression respondents seek to create, the issues are of fundamental constitutional significance. What is at stake in their resolution

is the extent to which media can inform consumers of dangerous and misrepresented products and services. Petitioners respectfully request that their petition be granted.

Dated: August 22, 1980.

Respectfully submitted,

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